82-1797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORTHERN PUBLISHING CO., INC.
d/b/a ANCHORAGE DAILY NEWS,
Petitioner,

v.

THOMAS GREEN, M.D.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

I. WHETHER THE COURT BELOW ERRED IN REVERSING SUMMARY JUDGMENT FOR THE DEFENDANT ON THE ISSUE OF ACTUAL MALICE?

II. WHETHER SUMMARY JUDGMENT WAS THE APPROPRIATE VEHICLE FOR DISPOSITION OF THIS CASE IN VIEW OF THE OVERWHELMING EVIDENCE SUPPORTING DEFENDANT'S GOOD FAITH BELIEF IN THE TRUTH OF THE PUBLICATION?

III. WHETHER THE ALLEGEDLY LIBELOUS STATEMENTS ARE CONSTITUTIONALLY PROTECTED EXPRESSIONS OF OPINION?

**Pursuant to Supreme Court Rule 28.1, please be advised that majority ownership of Northern Publishing Co., Inc. is held by McClatchy Newspapers group of Sacramento, California. Petitioner has no subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of The Supreme Court of the State of Alaska is unreported but set forth in the Appendix at 1a.

JURISDICTIONAL STATEMENT

This action for libel was filed by Thomas Green, M.D. in the Alaska Superior Court, Third Judicial District on March 31, 1976. On November 15, 1979 Defendants Northern Publishing Co., Inc., d/b/a/ Anchorage Daily News, filed a Motion for Summary Judgement. On June 18, 1980 the trial court granted said motion in favor of the Defendant, holding that the editorial was not capable of a defamatory interpretation and that the Plaintiff could not satisfy the "actual malice" requirement of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). Thereafter, Plaintiff filed a Notice of Appeal from the judgment with the Supreme Court of the State of Alaska.

Following the filing of briefs, and the court's consideration thereof, on November 12, 1982 the Supreme Court of the State of Alaska entered an order reversing the trial court's summary judgment for Defendant-Petitioner, and remanding the case for further proceedings. Three Judges concurred with the majority opinion and two Judges dissented therefrom. The opinions below appear in the appendix at 1a.

On November 22, 1982, Petitioner filed a Petition for Rehearing in the Supreme Court of the State of Alaska, which was denied on February 1, 1983. The court's order denying the petition for rehearing appears in the appendix at 24a.

The Supreme Court of the State of Alaska having denied Petitioner's Petition for Rehearing, jurisdiction over this matter and the First Amendment issues herein is conferred on this Court by 28 U.S.C. § 1257 (3)(1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment of the United States Constitution provides, in part:

> "No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On January 7, 1976, David Paul Selberg was found dead in a jail cell at the Anchorage Sixth Avenue State Jail. As a result of his death and the inquest held to determine the cause

of death, the Anchorage Daily News commenced a series of articles written by reporter Nancy Doherty to establish the facts and background surrounding the death. The Anchorage Daily News published these articles on February 28, March 1 and March 2, 1976. These articles appear in the appendix at 27a. The series was followed by additional articles also written by Ms. Doherty and culminating in the editorial published on March 24, which is the subject of the complaint in this case. Said article is set forth in its entirety in the appendix at 25a.

In her affidavit accompanying the Anchorage Daily News' Memorandum in Support of a Motion for Summary Judgment, Ms. Doherty indicated that she talked to a number of individuals who had contacts with David Selberg during his incarceration preceding his death. She also stated that she listened to the transcript of the inquest into David Selberg's death and read the written statements made by the jurors. In the course of her dealings with Mr. Abbott, the Editor of the Anchorage Daily News, she relayed much of the information about the incident to him. At the time the editorial was written, the facts set forth below were known by Mr. Abbott, Ms. Doherty or both.

During the week between Dr. Green's two visits, Selberg was apparently visited twice a day by Dr. Green's physician's assistant (although there is no evidence that the physician's assistant ever went into Selberg's cell at any time). Selberg's condition did not improve. Legal counsel was not appointed. Jailer Marvin Matthews testified as to Selberg's wild behavior. He threw food on the floor or in the toilet, then proceeded to eat his food out of the toilet. Selberg would often tear his clothes off and oftentimes he would splatter the cell walls, the floor and himself with soiled food and body waste. Showers were forcibly administered to Selberg on two different occasions with the last shower being changed alternately between extremely hot and cold water. Ronnie Epperson, a correctional officer, also testified that Selberg was without water during the last few days before his death. A number of officers expressed

concern about Selberg's weight loss in the last few days of his incarceration which was estimated at 30 pounds. Slightly more than 24 hours after Dr. Green's visit to the door of David Selberg's cell, Selberg was dead.

At the conclusion of the evidence at the coroner's inquest the court read the standard inquest instruction on negligent homicide. Because of the testimony the jurors had heard they were frustrated with the choice left to them and their concern about the level of negligence in the case was evident at the conclusion of the hearing. Even though the jury's verdict was death from natural causes some of the jurors felt strongly enough about the evidence they had heard to ask that their written comments be read into the record. Juror Evelyn Moore stated:

> There certainly was negligence involved in David Selberg's treatment; (1) the length of time between his incarceration and his psychiatric appointment, (2) the cursory medical examination of David Selberg, (3) the care of David Selberg while he was incarcerated. These three things at a needless indifference to the right and rights of safety of one David Selberg.

Juror Marie Dickey stated:

> Although I could find no one person guilty of negligent homicide in the death of David Selberg, I do strongly feel that there was negligence perpetrated on him in life. I believe also that these people who had contact with him at the correctional institute should have pushed harder for psychiatric help. Dr. Green and/or his physician's assistants should have followed up vigorously for his request for an examination.

Finally, Juror William Anderson commented:

> Even though it is doubtful that any physician on earth could have prevented Mr. Selberg's death I feel that the medical attention received was minimal. I find it hard to believe that a 20th century physician

> would tolerate the filth exhibited in the photos Investigator Barnard processed of the corpse. Neither can I understand why that physician would allow a period of over a week to pass without this patient receiving psychiatric treatment when his order for treatment was amplified with, "ASAP".

The Commissioner of the Alaska State Department of Health and Social Services, Frank Williamson, cancelled the $125,000 per year contract of Dr. Thomas F. Green less than two months after the coroner's inquest.

INTRODUCTION

This libel case presents this Court with an opportunity to address an issue of grave concern to newspapers throughout this country. This case also presents this Court with an opportunity to alleviate the overburdened trial and appellate courts in this nation by reaffirming the importance of summary disposition in cases decided under *New York Times* v. *Sullivan.* All too frequently, trial courts have declined to exercise the mandate of *New York Times* by failing to grant summary judgment in favor of defendants in cases where the undisputed facts demonstrate conclusively that clear and convincing evidence of actual malice does not exist.

If the actual malice test becomes a mere jury instruction, then there exists a grave danger that the effects and abuses of litigation will take a severe toll on those who inform the citizens of this country on the activities of their government. Your petitioner respectfully urges this Court to send a clear message reaffirming the utilization of summary judgment in cases such as this wherein the good faith of the publisher is beyond question.

I. THE COURT BELOW ERRED IN REVERSING SUMMARY JUDGMENT FOR THE DEFENDANT ON THE ISSUE OF ACTUAL MALICE

It is apparent that the Court below has failed to address the line of First Amendment cases decided by this Court which define in detail the standards for determining the existence of

actual malice. As a consequence, the Alaska Supreme Court erroneously reversed the trial court's entry of summary judgment and remanded the case for trial.

The Supreme Court for the State of Alaska has established a rule in that jurisdiction which is contrary to the decisions of this Court. If this decision is permitted to stand, Alaska newspapers will be forced to make qualitative judgments weighing conflicting statements of experts who are public officials, and may be held liable if their evaluations of such public sources are challenged.

In *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), this Court established constitutional protections for media Defendants in defamation actions. This Court held that public officials must prove by clear and convincing evidence that defamatory statements were published with actual malice; that is, with knowledge of falsity or reckless disregard for truth. In rejecting the common law rules of strict liability and presumed damages, this Court reaffirmed its commitment to the principle that uninhibited discussion of the conduct of public officials was fundamental to the operation of the American system of government. *Id.,* at 270.

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . self-censorship.

Id., at 279.

In *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964), this Court held that actual malice in the form of reckless disregard for truth requires "a high degree of awareness of their probable falsity."

This Court further refined the definition of actual malice in *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968), holding that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably

> its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra,* the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." 379 U.S. at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

This Court's ruling in *St. Amant* v. *Thompson, supra,* identified the following evidence that may be employed to attempt to establish "actual malice:"

1. The communication has been fabricated by the defendant;

2. It is the product of the defendant's imagination;

3. It is based wholly on an unverified anonymous telephone call;

4. It contains allegations that are so inherently improbable that only a reckless person would put them in circulation;

5. It is published despite obvious reasons to doubt the veracity of the informant upon whom the article is based or the accuracy of his reports.

The appellate court below found no evidence of any of the foregoing.

It is undisputed that imperfect investigation does not in itself establish "actual malice." *St. Amant, supra,* at 733. It is equally well settled that a mistake in interpreting events or documents does not evidence the necessary state of mind. *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971); *Orr* v. *Argus-Press Co.,* 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979). Publishing facts harmful to the plaintiff while not publishing others that were mitigating does not constitute actual malice. *Reliance Insurance Co.* v. *Barron's,* 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977). It is similarly insufficient for a plaintiff to point to vituperation or exaggerated language. *Guthrie* v. *Annabel,* 50 Ill. App. 3d 969, 365 N.E. 2d 1367, 3 Media L. Rep. (BNA) 1152 (1977); *Rose* v. *Koch,* 278 Minn. 235, 154 N.W. 2d 409 (1967). Such evidence does not indicate a publisher's lack of belief in the truth of his statements.

Investigative failures, if they do not in context indicate knowledge of falsity or subjective awareness of probable falsity, cannot themselves constitute "actual malice." *St. Amant* v. *Thompson, supra,* at 733. Defendants have been held to be free of "actual malice" despite a general failure to investigate, *Id.,* failure to talk to the plaintiff before publication,[1] failure to

[1] *Hurley* v. *Northwest Publications, Inc.,* 273 F. Supp. 967 (D. Minn. 1967), *aff'd,* 398 F.2d 346 (8th Cir. 1968); *Malerba* v. *Newsday, Inc.,* 64 A.D. 2d 623, 406 N.Y.S.2d 552, 4 Media L. Rep. (BNA) 1110 (N.Y. App. Div. 1978).

verify information,[2] publication of material incapable of verification,[3] failure to discover that published material relied upon had later been retracted,[4] and failure to discover contradictory material in the defendant's files but not at the time of publication actually known to the defendant's employees responsible for the particular publication.[5]

It is readily apparent from the undisputed record below, that the defendant's conduct does not rise to the level of blatantly reckless or knowingly false publication required under the decisions of this Court. There is overwhelming evidence that after weeks of investigation, involving numerous interviews with public officials including the plaintiff and his immediate supervisor, defendants formed a good faith belief in the opinions expressed in the March 12, 1976 editorial. The reporter interviewed dozens of witnesses and wrote three extensive reports prior to publishing its editorial opinion in the final article. These four articles are reproduced in their entirety in the appendix at 27a.

In her deposition, Nancy Doherty, Anchorage Daily News reporter, reiterated her statement in one of the articles preceding the editorial in question. . .

> "that just about everybody I talked with in this case who was familiar with the case, questioned the conclusion that the last nine days of life did not

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[2] *Samborsky* v. *Hearst Corp.*, 2 Media L. Rep. (BNA) 1638 (D. Md. 1977); *Fadell* v. *Minneapolis Star and Tribune Co., Inc.*, 425 F. Supp. 1075, 2 Media L. Rep. (BNA) 1961 (N.D. Ind. 1976), *aff'd* 557 F.2d 107, 2 Media L. Rep. (BNA) 2198 (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977).

"While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official." *New York Times Co.* v. *Connor*, 365 F.2d 567, 576 (5th Cir. 1966).

[3] *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 2 Media L. Rep. (BNA) 1545 (2d Cir. 1977) *cert. denied sub. nom. Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977).

[4] *Alpine Construction Co.* v. *DeMaris*, 358 F. Supp. 422 (N.D. Ill. 1973).

[5] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 287 (1964); *Trans World Accounts, Inc.* v. *Associated Press*, 425 F. Supp. 814, 2 Media L. Rep. (BNA) 1334 (N.D. Cal. 1977).

> contribute to his [Selberg] death." (File No. 2, Doherty Depo. p. 64, File No. 1, p. 102)

In addition to conversations with two out-of-state pathologists[6] and the comments of three jurors at the coroners' inquest, Ms. Doherty was aware of the doubts expressed by Dr. Green's ultimate superior, Dr. Frank Williamson, Commissioner of Health and Welfare of the State of Alaska at the time of Selberg's death. In answer to the question of plaintiff's attorney as to whether she considered the state, not nature, to be responsible for the death of Selberg, Ms. Doherty answered:

> I consider that—well, the people that I talked to involved with the state, such as Frank Williamson, felt that, as he said they were taking those steps to make sure that such a tragedy never happens again.
>
> Let me get the direct quote here. He said, 'I am not trying to be defensive. We are all guilty. The fact is the man died and *should not have died.* I think we can stop it from happening again.' " (Tr. File No. 2, Doherty Depo. p. 99, File No. 1, p. 106, 107) (*emphasis added*).

In the Daily News article of March 12, 1976, which told of Dr. Green's firing by Commissioner Williamson, the Commissioner was quoted as saying, "I think . . .we can stop this from happening again." (Tr. File No. 1, p. 111) Finally, Dr. Williamson was quoted in a Daily News article preceding the March 24 editorial as saying:

> It looks like a total foul-up . . . . There was a major breakdown in just about every element of the system. If *anyone* along the way had made another decision, Selberg would still be alive." (Tr. File No. 1, p. 108; *emphasis added*).

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[6] The Daily News concedes that while Ms. Doherty could not identify the two out-of-state pathologists to whom she talked, it should be pointed out that she discussed those conversations with editor Stan Abbott and that after a diligent search several years after the publication, the notes she made of the conversations could not be located.

Dr. Williamson's view that Dr. Bierne's conclusion was not the final word on Selberg's death was reinforced with his appearance on the KAKM public affairs television program on Selberg's death. See File No. 1, p. 233-239. Significant in the transcript of the program is the following interchange between Ms. Doherty and Commissioner Williamson.

Doherty: You stated to me in an earlier interview that if anyone involved with David Selberg along the way had made a different decision that he might be alive today. Can you explain what you meant by that?

Williamson: What I meant by that was first of all, David's death was by natural causes as determined by the coroner's inquest. The autopsy revealed a spontaneous neumothorax, both lungs, cause unknown, and it can logically be assumed that no one could have averted his death. That's one possibility. Another is that the predisposing condition of his ultimate physical condition might have been changed, I don't know, by medical attention in a proper setting and I do think that had anyone along the way, friends, police officers, corrections personnel, or whatever, been adamant in describing his condition, he would have ended up in a different physical setting and under a different regimen of care and I think it is quite likely that the medical problems that arose his last day of life might have been averted. No one can really answer that. (Tr. File No. 1, p. 239)

Finally, Ms. Doherty reiterated a statement attributed to Dr. Green in one of the articles preceding the editorial when she stated:

> "In fact, Dr. Green himself suggested, as stated in the March 9, 1976 article, 'Green goes on to speculate that Selberg may have had, weak spots on the surface of his lungs, 'a freakish lesion' that could have developed spontaneous leaks by his falling or stumbling and hitting the bunk'." (Tr. File No. 2, Doherty Depo. p. 48; File No. 1, p. 105).

It is clear from the foregoing uncontroverted facts that plaintiff cannot meet his burden of showing actual malice on the part of the defendant as required by this Court. There has been no showing that anyone associated with the news story had serious doubts about any of the comments published in the March 24th editorial. In her deposition, Ms. Doherty was very clear as to her confidence in the accuracy of the published material.

Defendant's attorney: With regard to the statements of fact published in these articles, do you have any reason to doubt the veracity of any sources that you relied upon? . . . .

Doherty: No I didn't. When I did doubt the source or veracity of the source, I didn't include the information. (Tr. File No. 2, Doherty Depo. p. 115)

Defendant's attorney: Do you have any reason to doubt the truth of any of the statements you made in any of these articles?

. . . .

Doherty: No, I had no reason to write anything other than what I thought was the truth. Having just come to Anchorage I had no vested interest in one thing or another. (Tr. File No. 2, Doherty Depo. p. 116)

The Daily News has established that the editor and reporter involved herein had a good faith belief in the truth of all of the statements of fact and the expressions of opinion based thereon. The editorial did not attempt to lay specific blame but rather criticized the system that permitted the "tragedy" to occur.

The one article sued upon was based entirely on the action taken and expressions of culpability made by the plaintiff's superior. The Commissioner's direct action in firing the plaintiff because of Mr. Selberg's death is the central undisputed fact in this litigation. The defendant herein did no more than report upon the events surrounding plaintiff's firing.

In conclusion, a public official should not be entitled to recover damages for libel where a newspaper does nothing more than report his dismissal and to concur through an editorial with the opinion of his superior that the state might have prevented the death of one in its charge. The facts in this case could never give rise to serious doubts in the mind of the publisher.

II. SUMMARY JUDGMENT WAS THE APPROPRIATE VEHICLE FOR DISPOSITION OF THIS CASE IN VIEW OF THE OVERWHELMING EVIDENCE SUPPORTING DEFENDANT'S GOOD FAITH BELIEF IN THE TRUTH OF THE PUBLICATION

Petitioner respectfully urges this Court to reaffirm the importance of summary disposition in cases involving protection of First Amendment rights under *New York Times* v. *Sullivan.* For if the actual malice test becomes a mere jury instruction, then there exists grave danger that the effects and abuses of litigation will take a severe toll on those who inform the citizens of this Country on matters of important public concern. In the absence of prior judicial scrutiny, all libel cases will be placed before juries who will not have the benefit of the Court's complex analysis of the doctrine of actual malice which has been so carefully delineated over the years since 1964.

This Court has often stated that protection of First Amendment freedoms may require special safeguards in law suits by public officials. Those protections are inherent in the exacting standard of clear and convincing proof of actual malice. As this Court observed in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 342 (1974):

> This standard [of clear and convincing proof of actual malice] administers an extremely powerful anecdote to the inducement to self-censorship of the common law rule of strict liablity for libel and slander. And it exacts a correspondingly high price for the victims of defamatory falsehood.

In *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966) *cert. denied,* 385 U.S. 1011 (1967), Judge Wright, in

a frequently cited passage, noted the importance of summary judgments in defamation suits:

> Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement.
>
> In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered." (Citations omitted)

Accord, Bon Air Hotel, Inc. v. *Time, Inc.*, 426 F.2d 858, 864 (5th Cir. 1970); *Time, Inc.* v. *Johnston*, 448 F.2d 378, 383 (4th Cir. 1971); *Fitzgerald* v. *Penthouse International, Inc.*, 525 F. Supp. 585, 596 (D. Md. 1981) *rev'd on other grounds.* No. 81-2170, 8 Media L. Rep. (BNA) 2340 (4th Cir. Oct. 13, 1982); *Woods* v. *Hearst Corp.*, 2 Media L. Rep. (BNA) 1548, 1549 (D. Md. 1977); *Meeropol* v. *Nizer*, 381 F. Supp. 29, 32 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1977).

A number of lower courts have suggested that traditional summary judgment procedures should be applied with greater

vigilance in cases decided under *New York Times* v. *Sullivan.* Courts of this persuasion have formulated the principle several different ways. They have said, for example, that summary judgment procedures are "an integral part of constitutional protection afforded defendants;" [7] "the proper vehicle for disposition" [8] of cases under the *New York Times* rule; "even more essential" [9] than in other cases; and, that summary judgment should be "particularly utilized." [10] It has been asserted that

> [a]lthough courts are loathe to grant a motion for summary judgment . . . the courts have often required a more rigid compliance with the requirements of Rule 56(e) of the Federal Rules of Civil Procedure when the action involves a defendant's First Amendment rights, since prolonged litigation might have a "chilling effect" on the exercise of such rights.[11]

Several courts have simply applied the extraordinary protection of *New York Times* to determine whether actual malice may be proven under any factual scenario.[12]

Petitioner respectfully submits that the extraordinary burden of proving clearly and convincingly, the existence of reckless or knowing falsehood inherently induces defendants to seek, and judges to grant, summary judgment in libel suits brought by public officials. This court has built into the standard of liability, the substantial First Amendment considerations which are essential to freedom of the press in this country.

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[7] *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971).

[8] *LaBruzzo* v. *Associated Press*, 353 F. Supp. 979, 982 (W.D. Mo. 1973).

[9] *Washington Post Co.* v. *Keogh*, 365 F. Supp. 965, 968 (D.C. Cir. 1966).

[10] *Novel* v. *Garrison*, 338 F. Supp. 977, 980 (N.D. Ill. 1971).

[11] *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). *See also Bon Air Hotel* v. *Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970). *But see Wasserman* v. *Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970) (reversing summary judgment); *Time, Inc.* v. *McLaney*, 406 F.2d 565, 573 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969) (appearing to apply traditional principles).

[12] *Guam Federation of Teachers, Local 1581* v. *Ysrael*, 492 F.2d 438, 441 (8th Cir. 1974).

The facts in this case are undisputed. The defendant accurately reported in the extensive series of articles: (1) that the coroner's inquest found that Selberg had died of natural causes; (2) that three of the jurors at the inquest believed Selberg received inadequate medical care; (3) that the plaintiff was fired by the Commissioner in spite of the coroner's findings; (4) that the Commissioner felt that the state was responsible for the death and that something would be done to prevent a similar occurrence in the future.

The editorial simply stated that the publisher concurred with the view expressed by the Commissioner, the member of the executive branch of state government charged with supervising the jail, that something should be done to protect those who do not have the mental capacity to protect themselves.

Nowhere in these undisputed facts is it possible to glean the slightest inference of actual malice.

Your petitioner respectfully urges this Court to reverse the findings of the Supreme Court for the State of Alaska and spare the petitioner the expense and disruption of trial so that it may pursue, unimpeded, the business of providing the people of Alaska with vital information concerning the function of their government.

III. THE ALLEGEDLY LIBELOUS STATEMENTS ARE CONSTITUTIONALLY PROTECTED EXPRESSIONS OF OPINION

In *New York Times* v. *Sullivan,* 376 U.S. 254, 285 (1964), this Court declared:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . We must "make an independent examination of the whole record," *Edwards* v. *South Carolina,* 372 U.S. 229, 235, 9 L.Ed 2d 697, 702, 83 S. Ct. 680, so as to

> assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. (footnote omitted).

Petitioner respectfully requests that the Court make an independent review of the whole record of this case to determine that the allegedly defamatory statement is a protected expression of opinion as a matter of constitutional law.

At common law a statement of opinion was only immune from defamation liability if it was founded on truthful facts which fully and fairly justified the statement.[13] Constitutional law and federal standards began to preempt this common law privilege of "fair comment" when the Supreme Court adopted a minority view that, in spite of an erroneous factual basis, commentary about public officials, *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), public figures, *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), and matters of general public interest are protected, *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971), provided there is no showing of actual malice.

In *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), the Court limited the constitutional privilege to commentary only concerning public officials and public figures. The scope of the privilege, however, was actually expanded in the same case when this Court asserted that constitutionally there is no such thing as a false ideal or opinion. The Court declared that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Id.* at 339-40. One year later the Court further implied that only a false factual statement

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[13] *See Owens* v. *Scott Publishing Co.,* 46 Wash. 2d 666, 284 P.2d 296 (1955), *cert. denied,* 350 U.S. 968 (1956); Restatement of Torts § 606 Comment b (1938); *See also Venn* v. *Tennessean Newspapers,* 201 F. Supp. 47 (M.D. Tenn. 1962); *Golden North Airways* v. *Tanana Publishing Co.,* 218 F.2d 612 (9th Cir. 1954); *Lorillard* v. *Field Enterprises,* 65 Ill. App. 2d 65, 213 N.E. 2d 1 (1965); W. Prosser, Law of Torts §110 (3d ed. 1964).

concerning a public official or public figure can be defamatory when it stated that

> [I]n defamation actions where the protected interest is personal reputation, the prevailing view is that truth is a defense; and the message of the New York Times . . . , *Garrison* v. *Louisiana* . . . , *Curtis Publishing Co.* . . . and like cases is that the defense of truth is constitutionally required where the subject is a public official or public figure.

Cox Broadcasting Corp. v. *Cohn,* 420 U.S. 469, 489-90 (1975) (footnote and citations omitted).

Two principles of constitutional law emerge from the foregoing. First, defamatory statements must be false to be actionable.[14] Second statements of opinion cannot be false. It follows therefore that opinion is constitutionally protected under the decisional authorities of this Court. As analyzed by First Amendment Scholar Robert D. Sack,

> If this post-*Gertz* approach is employed, it is irrelevant that the plaintiff is a public official or public figure, or that the opinion is "fair", or whether it is based on facts truly stated, generally understood or privileged. (footnote omitted). If it is an opinion, as a matter of constitutional law it is not actionable."

R. Sack, *Libel, Slander and Related Problems,* 179 (1980). *See also Gertz, supra,* at 339-40.

The allegedly defamatory suggestion in the editorial in the March 24, 1976 edition of the Anchorage Daily News, that the death of inmate David Selberg could have been prevented, is as a matter of constitutional law a nonactionable expression of opinion. App. at 25a. The editorial and the preceding series of investigatory news articles truthfully revealed the relevant facts surrounding the death of David Selberg and the subsequent

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[14] "An assertion that cannot be proved false cannot be held libelous," *Hotchner* v. *Castillo-Puche,* 551 F.2d 910, 913 (2nd Cir. 1977), *cert. denied sub. nom. Hotchner* v. *Doubleday & Co.,* 434 U.S. 834 (1977); *Accord Potts* v. *Dies,* 132 F.2d 734 (D.C. Cir. 1942), *cert. denied,* 319 U.S. 762 (1943).

actions of the State of Alaska Department of Health and Social Services. No false statements of fact were made. The only controversial allegedly defamatory assertions are statements of opinion based on the accurately disclosed facts. Brief on Appeal for Appellee at 42-3.

There is no question of any defamatory liability as to the report that Dr. Green had been terminated by the Commissioner of the State Department of Health and Social Services, Frank Williamson, following Selberg's death because it is a true statement of fact. Justice Burke of the Supreme Court of the State of Alaska held that Respondent, Thomas Green, M.D., was a "public official" as defined by this Court. App. at 10a, *New York Times,* 376 U.S. 254, *Rosenblatt* v. *Baer,* 383 U.S. 75, 85 (1966), Restatement (Second) of Torts § 581A(1977), and truth is a complete defense to defamation liability in public official and public figure libel litigation. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 489; *See also* W. Prosser, Law of Torts § 116 (4th ed. 1971). The truthfulness of the reported facts was never questioned nor challenged by either the Supreme Court for the State of Alaska nor the Respondent himself. Brief on Appeal for Appellee at 38 n.7.

Opinion is distinguished from fact to preserve our freedom of discussion about public issues as guaranteed under the First Amendment. *New York Times,* 376 U.S. 254. "One should not be deterred from speaking out through the fear that what he gives as his opinion will be construed by a court as inferring, if not actually amounting to a mistatement of fact". *Pearson* v. *Fairbanks Publishing Co.,* 413 P.2d 711,714 (Alaska 1966). The Supreme Court of the State of Alaska recognizes that freely expressed opinions sometimes subject individual reputations to public scrutiny, yet nevertheless it cherishes and champions such freedom. The Supreme Court of the State of Alaska itself explained the balance when it declared that

> The law of defamation embodies important public policy that individuals should generally be free to enjoy their reputations unimpaired by false and defamatory attacks. But there is a well established counter policy that in certain situations there is a

> paramount public interest permitting persons to speak or write freely without being restrained by the possibility of a defamation action. In such situations the person writing or speaking is said to enjoy a privilege.

Fairbanks Publishing Co. v. *Francisco,* 390 P.2d 784, 793 (Alaska 1964). This position was reinforced by that Court's own statement in *Pearson, supra,* at 713, that

> We believe that a fair balance of these competing interests is achieved where the law of defamation permits one without liability for damages, to comment, criticize and pass judgment on statements made by another on an issue or a matter of public interest, even if such comment, criticism and judgement involves mistatements of fact . . .

It is apparent that in reversing the trial court's summary judgment for Defendant-Petitioner the Supreme Court for the State of Alaska ignored the First Amendment principles which it had heretofor so vigorously supported.

The line between fact and opinion is often a fine one.[15] The suggestion that David Selberg's death could have been prevented is nothing more than an expression of opinion based on the stated fact that the Respondent's contract was terminated soon after Selberg's death. The distinction depends on context and should be determined case by case. *Information Control Corp.* v. *Genesis One Computer Corp.,* 611 F.2d 781, 784 (9th Cir. 1980).

> In sum, the test to be applied in determing whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court

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[15] *See generally Goldwater* v. *Ginzburg,* 261 F. Supp. 784, 786 (S.D.N.Y. 1966), *aff'd* F.2d 324 (2nd Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970), (quoting W. Prosser, Law of Torts (3d ed. 1964)); *Buckley* v. *Littell,* 539 F.2d 882, 892-895 (2d Cir. 1976); *Street* v. *National Broadcasting Co.,* 645 F.2d 1227 (6th Cir. 1981); *Mashburn v. Collin,* 355 So.2d 879 (La.1977); *Good Government Group* v. *Superior Court,* 22 Cal. 3d 672, 586 P.2d 572 (1978), *cert. denied,* 441 U.S. 961 (1979); *Myers* v. *Boston Magazine,* 403 N.E.2d 376 (Mass. 1980); *Kutz* v. *Independent Publ. Co.,* 638 P.2d 1088 (N.M. App. 1981).

> examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Id. at 784

As set forth by Justice Matthews, with whom Justice Connor joined in dissenting from the majority opinion below of the Supreme Court of the State of Alaska, "[t]he editorial in question makes the factual report that Dr. Green had been terminated by the Commissioner following Selberg's death. In addition it commends the Commissioner for that act, among others. In so doing the editorial is merely expressing an opinion." App at 17a. There is no doubt that the allegedly defamatory material was published as an editorial. The writer, Ms. Doherty, also commented that "Mr. Williamson's candor in the case is a welcome contrast to others more directly connected with the Selberg death. The actions he has taken so far have been constructive, if overdue. We hope that the April 16 meeting here will reflect the same spirit." App. at 26a. Such remarks demonstrate that she was expressing an opinion of the true underlying facts set forth. *See Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U.S. 6 (1970). The dissent further states that "[T]here is no evidence that the expression of opinion did not represent the actual opinion of the editor of the Daily News or that the expression was made for the purpose of causing harm to Dr. Green . . ." App. at 17a. Each reader had the liberty to draw their own conclusion from the factual account made in conjunction with the opinions expressed. No harm could be done.

Justice Burke himself, in writing the opinion below for the Supreme Court of the State of Alaska, acknowledged that the

allegedly defamatory comments are statements of opinion but erroneously concluded that a factual implication of wrongdoing on Dr. Green's part gave rise to liability. Justice Burke stated that

> The editorial did not merely report the actions that the commissioner of Health and Social Services had taken in response to the Selberg incident, and then express its *opinion* approving those actions. . . . The alleged defamation relevant to this case is that the editorial under one interpretation seems to further imply that the Daily News *agreed* with the Commissioner and presented as fact the allegation that Dr. Green was at least partially responsible for Selberg's Death.

App. at 6a (emphasis added). The opinion further states that the editorial clearly implies that the Commissioner believed Dr. Green to be partially responsible for Selberg's death and that the Daily News was just expressing its agreement. App. at 6a-7a. Part II of the opinion below concluded by holding, "the editorial susceptible of being reasonably interpreted as meaning that the Daily News 'after an extensive investigation' *believed* Commissioner Williamson was correct in concluding that Dr. Green was at least partially responsible for David Selberg's death." App. at 7a (emphasis added).

In conclusion, Petitioner respectfully requests this court to consider the Restatement (Second) of Torts § 566 (1977) which provides as follows:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

The Anchorage Daily News disclosed the series of events on which its editorial comments were based rather than invite the audience to rely on mere implications. Such circumspection is not even required under constitutional principles. The Supreme Court has never required that underlying facts be published with the statement to justify expression of the opinion. *Gertz*, 418 U.S. at 339-40, established that constitutional protection is

not limited only to those opinions which have been approved by the courts. All opinion is protected under the First Amendment. As a matter of constitutional law the justification of personal observations and comments is not subject to judicial scrutiny, but only to the "competition of other ideas". *New York Times,* 376 U.S. 254.

CONCLUSION

Because of the important constitutional issues, involved in this case, Petitioner respectfully urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

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The Supreme Court of the State of Alaska

THOMAS GREEN, M.D.,
Appellant,

v.

NORTHERN PUBLISHING CO., INC.,
d/b/a ANCHORAGE DAILY
News, a business corporation,
Appellee.

File No. 5448

OPINION

[No. 2585—November 12, 1982]

Appeal from the Superior Court of the State of Alaska,
Third Judicial District, Anchorage,
Seaborn J. Buckalew, Judge

Appearances: James J. Delaney, John M. Moxness, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for Appellant. A. Robert Hahn, Jr., Stan B. Stanfill, Hahn, Jewell & Stanfill, Anchorage, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Burke, Matthews and Compton, Justices.

BURKE, Justice.
MATTHEWS, Justice, with whom CONNOR, Justice, joins, dissenting.
COMPTON, Justice, concurring.

The issue in this appeal is whether the superior court erred in granting summary judgment in favor of the defendant, in a libel action that arose out of an editorial appearing in defendant's newspaper.

I.

On December 29, 1975, David Selberg, a young pipeline worker, was arrested for disorderly conduct, after friends complained about his behavior at their home.[1] Selberg remained in jail for nine days, during which time he was examined by the plaintiff below, Thomas Green, M.D. Just after midnight, on January 7, 1976, Selberg died in his cell. According to the autopsy report,[2] Selberg died of natural causes, unrelated to his incarceration: spontaneous "bilateral pneumothorax," a condition involving the sudden collapse of both lungs.

Dr. Green had contracted with the state to provide medical services for the five correctional institutions in the Anchorage area.[3] He was in charge of coordinating all medical services in these institutions, and responsible for several part-time and full-time medical assistants. Dr. Green's routine included two visits a week to the jail where Selberg was held. He was alerted to medical emergencies by his medical assistants who visited the jails six days per week.

Two hours before Dr. Green's usual visit to the jail on December 29, 1975, he received a specific request to see Selberg, after a district court judge found Selberg unable to go through the arraignment procedure and ordered a medical evaluation. Dr. Green determined that, although Selberg was in good physical health, he was disoriented, "hallucinating wildly," and physically agitated to the point where he was running naked around his cell. Since Dr. Green was a general practitioner, not a psychiatrist, he recommended that Selberg

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[1] Earlier, his friends tried unsuccessfully to have Selberg committed to the Alaska Psychiatric Institute.

[2] The autopsy was performed by a pathologist, Michael Beirne, M.D.

[3] Dr. Green was also in private practice.

be removed "as soon as possible" from the jail and taken to a psychiatric facility for treatment and diagnosis. Prison policy required a court order authorizing the removal of a prisoner from the jail to obtain medical treatment. According to Dr. Green, he received the following oral instruction from his supervisor only a month or two prior to Selberg's incarceration: "Dr. Green, you in all instances, when we were [sic] certifying men out of this institution, you will abide by the Court Order method, and examine, make your recommendation, and it will be followed from there, using the Court System."[4]

Although such an order was issued by the district court, on December 30, 1975, the psychiatric examination was not scheduled until January 7, 1976. The court was aware of Dr. Green's recommendation that Selberg be moved "as soon as possible," but the judge did not interpret this as meaning that an immediate examination was required. The judge stated that he thought eight days between the order and the scheduled examination was relatively short since it usually took longer due to difficulties with bookings with the psychiatrists. During the nine days that Selberg was incarcerated, an attorney was never appointed to represent him.

Dr. Green did not see Selberg again until January 5, about twenty-eight hours before he died. During the period Selberg was incarcerated, his situation did not improve. Most of the time, Selberg was naked in a room where the temperature was about seventy-two degrees Farenheit, without blankets or a mattress. Apparently, Selberg would throw these objects against the wall of his cell. He was constantly disoriented. It was difficult and sometimes impossible for the correction officers to get Selberg to eat, and the officers could see that he was losing weight every day. When they could get Selberg to accept food, he would throw it on the floor or in the toilet and eat it from there. Sometimes, Selberg would cover his naked body with food and excrement. He was constantly active, throwing himself into the metal slab that was his bunk, and

[4] Apparently, this policy was adopted after an incident a year earlier, where an inmate, while being taken to a dental appointment, escaped and shot a police officer.

banging his head and body against the walls. Since Selberg refused to take showers, the officers forcibly administered them to him.

When Dr. Green arrived at the jail on January 5, he was surprised to learn that Selberg had not yet been removed from that facility. Dr. Green gave him a cursory examination, which consisted of observing Selberg through the window in the cell door. This was the same method of examination Dr. Green's medical assistants used while Dr. Green was away. Dr. Green was given a report of Selberg's activities between the 29th and the 5th.

A few minutes past midnight on January 7, the day scheduled for his psychiatric examination, Selberg died.

After Selberg's death and a coroner's inquest, the Anchorage Daily News commenced a series of news articles investigating the circumstances surrounding Selberg's death. These articles culminated in the editorial forming the basis for this action:

> Finally, the state has recognized its responsibility for the death of David Paul Selberg.
>
> The 23-year-old pipeline worker died in an Anchorage jail Jan. 7. In February a coroner's jury ruled that death was from natural causes. Then everyone involved chose to drop the sordid matter—to forget that a very sick man who had committed no crime had been locked in a 8½ by 7½ foot concrete cell for nine days and left to die.
>
> Earlier this month, The Daily News published an exclusive series on Selberg's death after an extensive investigation. Soon after, the state Department of Health and Social Services (HSS) began to look into the case, and Atty. Gen. Avrum Gross stated that although the Anchorage District Attorney's Office felt they could not prove criminal negligence, his office would act in an advisory capacity to HSS.

Since then, HSS Commissioner Frank Williamson has taken steps to assure that such a tragedy does not happen again.

First, he abruptly cancelled the $125,000 a year contract of Dr. Thomas F. Green, the physician serving Anchorage jails for the past six years.

Second, he held a meeting last week in Juneau with heads of the divisions of Corrections, Mental Health and Public Safety and members of the state court system.

Third, as a result of that meeting, he has appointed a committee to meet here April 16 for a day-long conference. This group is comprised of "principal figures in the criminal justice system and the private medical community" in Anchorage. Its purpose will be to establish definitive procedures for handling disturbed citizens such as Selberg, and to delineate clearly the responsibilities of the city police, the state troopers, the courts, the jails and our mental health facilities toward persons in their charge.

Mr. Williamson's candor in the case is in welcome contrast to others more directly connected with the Selberg death. The actions he has taken so far have been constructive, if overdue.

We hope that the April 16 meeting here will reflect the same spirit. We need positive results from those participating, for they are the ones who serve our community and must assure our safety.

Anchorage Daily News, March 24, 1976.

Thereafter, Dr. Green brought a libel action against the newspaper's owner, Northern Publishing Co., Inc., alleging that the editorial was defamatory. The superior court granted summary judgment in favor of the defendant, holding that the editorial was not capable of a defamatory interpretation and that the plaintiff could not satisfy the "actual malice" requirement of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686 (1964). This appeal followed.

II.

A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *See* Restatement (Second) of Torts § 559 (1977). The superior court found no suggestion in the editorial that Dr. Green was responsible for Selberg's tragic death. Partly on that basis it granted summary judgment. See Rule 56, Alaska R. Civ. P. We disagree and hold the defendant's editorial capable of a defamatory interpretation.

The editorial did not merely report the actions that the Commissioner of Health and Social Services had taken in response to the Selberg incident, and then express its opinion approving those actions. Nor did it merely imply that the Commissioner believed that Dr. Green was partially at fault for Selberg's death. The alleged defamation relevant to this case is that the editorial under one interpretation seems to further imply that the Daily News agreed with the Commissioner and presented as fact the allegation that Dr. Green was at least partially responsible for Selberg's death. Since this is a reasonable interpretation of the meaning of the editorial, summary judgment on the issue whether the communication was defamatory should not have been granted.

First, it is clear that the editorial implies that the Commissioner believes that Dr. Green was partially at fault for Selberg's death. The editorial begins with the statement that the state has "recognized its responsibility" for Selberg's death. It goes on to state that the Commissioner "has taken steps to assure that such a tragedy does not happen again. First, he abruptly cancelled the $125,000 a year contract of Dr. Thomas F. Green. . . ." Dr. Green is the only person named in the editorial who was related to Selberg's death. The Commissioner is said to have fired Dr. Green to prevent another tragic death such as Selberg suffered. The clear implication is that the Commissioner believed Dr. Green to be at least partially responsible for the death.

It is also clear that the Daily News was expressing its agreement with the state official regarding Dr. Green's responsibility. In the second paragraph of the editorial the Daily News said that Selberg was "a very sick man" who was "locked in a. . . cell. . . and left to die." This directly implies that Selberg was seriously ill at the time he was incarcerated and died in the jail when that illness was neglected. Having thus asserted that the treatment Selberg received caused his death, the Daily News then showed its agreement with the view that Dr. Green was at least partially responsible. It was the Daily News, after all, that phrased the statement that "[s]ince then, HSS Commissioner Frank Williamson has taken steps to *assure* that such a tragedy does not happen again." (Emphasis added.) Then, the Daily News stated that "[t]he actions he has taken so far have been constructive, if overdue." The first of those actions, of course, was the firing of Dr. Green.

In conclusion, we hold the editorial susceptible of being reasonably interpreted as meaning that the Daily News, "after an extensive investigation," believed Commissioner Williamson was correct in concluding that Dr. Green was at least partially responsible for David Selberg's death. Such a meaning is clearly defamatory.

III.

Defamation defendants have two defenses—truth and privilege. The United States Supreme Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964), held that a state law which allowed only the defense of truth was an unacceptable burden on a media defendant's freedom of expression. Since the constitutional interest in freedom of speech and press required more, the court recognized a conditional constitutional privilege for media defendants in defamation suits brought by "public officials." The "condition" was that the privilege applied only if the media defendant had not uttered the defamation with "actual malice," *i.e.*, with actual knowledge that its utterance was false or with reckless disregard for its truth or falsity. *Id.* at 279-80, 11 L. Ed. 2d at 706. For the purpose of asserting the privilege, the defendant concedes

falsity but claims that because it lacked "actual malice," its defamatory utterance is protected under the First Amendment. Eaton, *The American Law of Defamation Through Gertz* v. *Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1381-86 (1975).

The Daily News asserts this conditional constitutional privilege in the case at bar. Partly on that basis, it was granted summary judgment, because the trial court believed that reasonable jurors could not find that it published the editorial with "actual malice." Dr. Green attacks that conclusion on two theories: (A) the Daily News cannot hold the privilege in this case because Dr. Green was not a "public official," and (B) even if the Daily News holds the privilege, summary judgment on the issue of "actual malice" was improper.

A. Is Dr. Green a "Public Official"?

In *New York Times,* the Supreme Court limited application of the new constitutional privilege to those defamatory falsehoods which dealt with the "official conduct" of a "public official." *Id.* at 279, 11 L. Ed. 2d at 706. The perimeters of the defense were drawn shortly thereafter in *Rosenblatt* v. *Baer,* 383 U.S. 75, 15 L. Ed. 2d 597 (1966):

> [T]he "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.
>
> . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply.

Id. at 85-86, 15 L. Ed. 2d at 605-06.

The boundaries of the "public official" concept were further amplified in a footnote:

> It is suggested that this might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

Id. at 86 n.13, 15 L. Ed. 2d at 606 n.13.

Dr. Green contracted with the state to provide medical services to the five jails in the Anchorage area. His annual contract for $125,000 had to cover salaries for seven full and part-time employees. Dr. Green himself devoted three-quarters of his time to performing this contract; his remaining time was spent in private practice. He was responsible for training and supervising his medical assistants, as well as the coordination of the effort to supply routine and emergency services on a twenty-four hour basis. Dr. Green followed procedures established by the Department of Corrections, including the requirement of a court order to release an inmate for medical treatment. He was head of a small operational unit providing a specific limited service to a local element of a state agency. We conclude, therefore, he was not a policy-maker or a member of the governmental "hierarchy" charged with "substantial responsibility" for the conduct of governmental affairs.

Dr. Green's position was not highly visible in the community and usually attracted little "public scrutiny." His position was of the type which generally remains unnoticed until something controversial occurs. In fact, the functioning of his unit and of Dr. Green himself did not come under critical public attention until the unfortunate death of an individual whose grave condition developed while under the unit's medical

supervision. Thus, one could argue that Dr. Green's position did not invite public scrutiny "*entirely apart* from the scrutiny and discussion occasioned by the particular charges in controversy." *Rosenblatt* v. *Baer,* 383 U.S. at 86 n.13, 15 L. Ed 2d at 606 n.13.

In spite of the foregoing, we believe that the person directing the provision of medical services to all Anchorage area state inmates holds a position of sufficient importance that the public has "an independent interest in the qualifications and performance of the person who holds it beyond the general public interest in the qualifications and performance of all government employees." *Id.* at 86, 15 L. Ed. 2d at 606. The significance of this independent public interest is not lessened by the normally quiescent character of the public job. We therefore hold that Dr. Green was a "public official" and that the "actual malice" standard applies to his defamation action against a media defendant.

B. Was summary judgment on the "actual malice" issue properly granted?

The "actual malice" test is satisfied if the plaintiff can show with convincing clarity that the defamatory falsehood was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times,* 376 U.S. at 279-80, 11 L. Ed. 2d at 706. In order to apply the test to this case, it is necessary to determine the meaning of the "reckless disregard" standard.

Mere negligence on the part of the defendant is not enough to overcome the privilege and permit a public official to recover against a media defendant. *See, e.g., St. Amant* v. *Thompson,* 390 U.S. 727, 20 L. Ed. 2d 262 (1968):

> [The] cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

Id. at 731, 20 L. Ed. 2d at 267.

"Reckless disregard," for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. *Mahnke* v. *Northwest Publications, Inc.*, 160 N.W.2d 1, 15-16 (Minn. 1968). There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement. Widener* v. *Pacific Gas & Electric Co.*, 142 Cal. Rptr. 304, 314 (Cal. App. 1997) (emphasis added).

On a motion for summary judgment, the moving party must establish the absence of a material issue of fact and the court is required to draw all reasonable inferences in favor of the non-movant. *Claubaugh* v. *Bottcher*, 545 P.2d 172, 175 (Alaska 1976). Here, we have already determined that reasonable jurors could find that the Daily News stated that Dr. Green was at least partially responsible for David Selberg's death. The question then, is whether this statement was made with knowledge or at least with serious doubt as to its truth. To be entitled to summary judgment, the defendant must establish that there was no triable issue of fact on this question.

Dr. Green argues that since the Daily News was aware of strong evidence showing that Selberg's death was not related to the medical treatment he received in jail, a reasonable person could conclude that the Daily News acted with "actual malice," as that term is used here, and therefore, the question must go to a jury. The primary evidence to support Dr. Green's argument is the testimony and coroner's report of Dr. Michael Beirne, the pathologist who performed the autopsy on Selberg. Dr. Green also points to the coroner's inquest, which found that Selberg's death was from natural causes and not due to criminal negligence. It is not disputed that both Nancy Doherty, the Daily News reporter, and Stan Abbott, the executive editor of the Daily News, were aware of this evidence.

At the coroner's inquest, Dr. Beirne testified that Selberg had died suddenly and unexpectedly from a spontaneous "bilateral pneumothorax," which is caused by air leaking out of the lungs into the chest cavity. The leak that caused Selberg's lungs to collapse occurred without apparent external influence,

hence the term "spontaneous." In effect, Dr. Beirne believed that Selberg's unbalanced mental condition did not contribute to the collapse. Also, Dr. Beirne believed that there may not have been any symptoms to alert Dr. Green or his assistants to the possibility or onset of a pneumothorax.

The result is that the writers of the editorial knew of substantial evidence that Dr. Green was not responsible for Selberg's death. Therefore, we must reverse the trial court's order of summary judgment unless we find that in spite of this substantial evidence, the defendant, as a matter of law, could not have entertained any serious doubts as to the truth of its assertion that Dr. Green was in some way responsible for Selberg's death.

The defendant's best hope of avoiding recklessness lies in Ms. Doherty's awareness of the views of Dr. Francis Williamson, Dr. Green's ultimate superior and the Commissioner of Health and Social Services at the time of Selberg's death.[5] Commissioner Williamson, who is not a medical doctor, but a naturalist with a Ph.D., made certain relevant statements to Ms. Doherty which can be divided into three excerpts. These statements were published in the Daily News in articles written by Ms. Doherty. The first was made nearly two weeks before the March 24 editorial. Commissioner Williamson said:

FIRST EXCERPT

> I am not trying to be defensive; we are all guilty. . . . The fact is the man died and he should not have died . . . I think we can stop it from happening again. . . .
>
> It looks like a total foul-up. . . . There was a major breakdown in just about every element of the system. If anyone along the way had made another decision, Selberg would still be alive.

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[5] Ms. Doherty, the reporter, also claims that she talked to two pathologists outside of Alaska who were skeptical of Dr. Beirne's conclusion that nothing that happened to Selberg during his incarceration contributed to his death. However, Ms. Doherty could not recall the names or addresses of the pathologists, how she came in contact with them, or even locate the notes of those conversations.

In a March 10 article, Commissioner Williamson seems to strongly imply that Dr. Green's efforts to get Selberg transferred from the jail were inadequate. The following is a portion of the article:

SECOND EXCERPT

> Williams[on] said Tuesday that persons suspected of being mentally ill frequently wind up in jail on minor charges. The procedure for getting them treatment—through medical examination, a written opinion from the doctor informing the court and then an eventual court order—was ordinarily "adequate and timely." In this case, however, he said, "It was not made plain to anyone that this guy was really very sick."
>
> Both the arresting officers and the judge involved in the case have attested to the difficulty of getting a mentally disturbed and possibly violent person such as Selberg admitted to the Alaska Psychiatric Institute (API). Williamson, however, believed that these statements arose from misinformation rather than fact. "There was nothing to stop anyone—the law enforcement people or corrections or the medical staff—from making an on-the-spot decision, picking up the phone and calling API. I have trouble with all of it," he continued. "Especially the medical end." [6]

Finally, Ms. Doherty conducted a television interview of Commissioner Williamson where he gave his view concerning the cause of Selberg's death. This piece of evidence is inconclusive, however, because the record does not indicate when the interview occurred. If the interview occurred after the editorial was published, it would bear no relevance to the

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[6] It is significant to note that in the second sentence of this excerpt, Ms. Doherty acknowledges *her understanding* that under the procedure then in force at the jail, Dr. Green was not responsible for doing any more than he actually did—making his recommendation to the court that David Selberg receive a psychiatric examination "as soon as possible."

writer's awareness of the editorial's probable truth or falsity.[7] The excerpt from this television interview was as follows:

THIRD EXCERPT

> Doherty: You stated to me in an earlier interview that if anyone involved with David Selberg along the way had made a different decision that he might be alive today. Can you explain what you meant by that?
>
> Williamson: What I meant by that was first of all, David's death was by natural causes as determined by the coroner's inquest. The autopsy revealed a spontaneous [p]neumothorax, both lungs, cause unknown, and it can logically be assumed that no one could have averted his death. That's one possibility. Another is that the predisposing condition to his ultimate physical condition might have been changed, I don't know, by medical attention in a proper setting and I do think that had anyone along the way, friends, police officers, corrections personnel, or whatever, been adamant in describing and emphasizing the emergency nature of his condition, he would have ended up in a different physical setting and under a different regimen of care and I think it is quite likely that the medical problems that arose his last day of life might have been averted. No one can really answer that.

It is our determination that the statements from Commissioner Williamson to Ms. Doherty are insufficient to conclusively overcome the testimony and coroner's report of Dr. Beirne. We conclude that reasonable jurors could disagree as to whether the defendant entertained serious doubts about the truth of its assertion that Dr. Green was in some way responsible for Selberg's death.[8]

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[7] The date of this interview and therefore its relevance to the recklessness issue should be determined at trial.

[8] Since this is a review of a grant of summary judgment for the defendant, we are required to draw all reasonable inferences in favor of the plaintiff. Claubaugh v. Bottcher, 545 P.2d 172, 175 (Alaska 1976).

Thus, a material issue of fact existed, and summary judgment on the issue of "actual malice" was improperly granted.

REVERSED and REMANDED for further proceedings.

COMPTON, Justice, concurring.

Although I agree with the result reached in this case, I cannot subscribe to the reasoning leading to the conclusion that Dr. Green is a "public official."[1] Indeed, I conclude that the "actual malice" standard is applicable as a function of state law because the publication concerned a matter of public interest: whether Dr. Green is a "public official" as that term is understood within the relevant federal authorities is simply not relevant.

In *Pearson* v. *Fairbanks Publishing Co.*, we expressly ignored the limitations imposed by *New York Times* with the following language:

> On the one hand there is the interest in safeguarding the right to one's reputation. On the other hand there is the interest in allowing freedom of debate and expression on public questions and issues. We believe that a fair balance of these competing interests is achieved where the law of defamation permits one, without liability for damages, to comment, criticize and pass judgment on statements made by another *on an issue or matter of public interest,* even if such comment, criticism and judgment involves misstatements of fact—so long as such misstatements are relevant to the subject matter spoken or written about by the one claiming to be defamed and are not shown by him to have been made with *actual malice.* (Emphasis added.)

413 P.2d 711, 713 (Alaska 1966). In view of this holding, we found it unnecessary to speculate whether the United States

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[1] I find the attempt to categorize Dr. Green a "public official" a very convincing argument that he is not. Since resolution of that issue is unnecessary to decide this case, I will not belabor the point. It speaks for itself.

Supreme Court would extend "actual malice" protection where defamatory falsehoods involved other than official conduct of public officials.

Eventually, the United States Supreme Court did extend *New York Times* standard to events of public or general concern. *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296 (1971) (plurality opinion). We relied upon the *Rosenbloom* plurality opinion in deciding *West* v. *Northern Publishing Co.*, 487 P.2d 1304 (Alaska 1971). Curiously, *West* made no reference to *Pearson*, resting instead on *Rosenbloom* by application of the supremacy clause.

The plurality opinion in *Rosenbloom*, which set forth a view which never commanded the support of a majority of the Court, was ultimately rejected in *Gertz* v. *Welch*, 418 U.S. 323, 41 L. Ed. 2d 789 (1974). The *New York Times* exception was clearly reserved for public officials and public figures, as a matter of federal constitutional law. However, the Court was explicit in reserving to the states "... substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." 41 L. Ed. 2d at 809.

While the Supreme Court has come full circle, *Pearson* stands on its own, needing support from neither *New York Times* nor *Rosenbloom*. It is the law in this state, and whether Dr. Green is a public official involved in official conduct, or a public figure, is entirely irrelevant. The publication at issue in this case plainly concerned "an issue or matter of public interest," [2] and as a consequence a showing of actual malice is required by state law, independent of any related federal constitutional considerations.

MATTHEWS, Justice, with whom CONNOR, Justice, joins, dissenting.

A communication is defamatory if it tends to harm the reputation of a person. In this case, merely reporting the fact that Dr. Green's contract had been revoked by the Commissioner as a result of Selberg's death had the effect of damaging

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[2] Pearson v. Fairbanks Publishing Co., 413 P.2d at 713.

Dr. Green's reputation. The sequence of events carries with it a factual implication that Dr. Green had some role in causing the death. It may well be that such an implication is false. However, it is plain that the report of the revocation is privileged, and will not support in action for defamation.[1]

The editorial in question makes the factual report that Dr. Green had been terminated by the Commissioner following Selberg's death. In addition, it commends the Commissioner for that act, among others. In so doing the editorial is merely expressing an opinion. The opinion is favorable to Commissioner Williamson and thus, implicitly, critical of Dr. Green. The subject is a matter of public concern. The underlying sequence of events, the treatment Selberg received, his death, and the dismissal of Dr. Green, are true. The implication of fault on the part of Dr. Green is inherent in the fact of his dismissal and therefore privileged. Since there is no evidence that the expression of opinion did not represent the actual opinion of the editor of the Daily News or that the expression was made for the purpose of causing harm to Dr. Green, the editorial is within the fair comment privilege to the law of defamation.

Restatement of Torts § 606(1)(1938) sets out the fair comment doctrine:

> (1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
>
> (a) is upon,
>
> (i) a true or privileged statement of fact, or
>
> (ii) upon facts otherwise known or available to the recipient as a member of the public, and

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[1] Pulvermann v. A. S. Abell Co., 228 F.2d 797, 802 (4th Cir. 1956) states:

> [W]here a high official in the national organization of a political party is dismissed from his position in the party because he has been accused of dealing with the government . . . it is unthinkable that newspapers should not be allowed to give publicity to the matter without fear of being held to liability therefor in a libel suit.

(b) represents the actual opinion of the critic, and

(c) is not made solely for the purpose of causing harm to the other.

Section 607(2) of the Restatement contains a specific application of the fair comment privilege pertinent to this case:

> The privilege of criticism stated in § 606 includes a privilege to criticize the work of independent contractors which is being paid for out of public funds and the work of employees of such contractors.

The illustration to this subsection states:

> The A newspaper in an editorial criticizes the character of work which B, an independent contractor, is doing on the streets of X. The editorial is privileged criticism.

Id. comment k, illustration 3.

Based on the foregoing I would affirm the judgment of the superior court. I will, however, make several further observations.

First, if the editorial is treated as somehow defamatory independent of the natural defamatory meaning inherent in the fact of Dr. Green's dismissal, the gist of the defamation lies in the imputation of neglect to Dr. Green. The editor of the Daily News had no reason to doubt that such neglect existed, for he had before him the comments of those jurors who served on the coroner's jury who asked that written explanations for their verdict be read into the record. Juror Evelyn Moorehead stated:

> Because the cause of death, spontaneous pneumothorax, could have taken place at any time and any place I could not find criminal negligence, however, there is—there are questions left unanswered because we do not know what causes spontaneous collapse of both lungs. *There was certainly negligence involved in David Selberg's treatment;* (1) *The length of time between his incarceration and his psychiatric appointment,* (2) *the cursory medical examination of David*

Selberg, (3) *the care of David Selberg while he was incarcerated.* These three things point at a needless indifference to the rights and—rights of safety of one David Selberg.

Juror Marie Dickey stated:

> Although I could find no one person guilty of negligent homicide in the death of David Selberg, I do strongly feel that there was negligence perpetrated on him in life. He should have had an attorney appointed to look after his interest. It became obvious when he was looked on the 29th that he was in—booked on the 29th that he was incapable of looking out for his own interests. I believe also that these people who had contact with him at the correctional institute should have pushed harder for psychiatric help. *Dr. Green and/or his physician assistants should have followed up vigorously for his request for an examination. Dr. Green should have realized Mr. Selberg might be suffering from a bad LSD reaction.* Mr. Moses [the correction superintendent] should have checked records and became aware that Mr. Selberg had been in jail, incoherent, unclothed, unwilling to eat and in general completely out of his head and an emergency request initiated on his behalf for psychiatric and medical help in an institution equipped for this. Better, more complete records should be kept of the prisoner's actions than these indicated on the form shown to the jury, observation cumulative. These records should be reviewed by some one person who has authority to recommend medical help for prisoners needing it.

Finally, Juror William Anderson commented:

> With the additional instructions provided by the court I could reach no verdict but that which has been submitted. No one individual involved in the tragedy of David Paul Selberg can be held responsible as the direct or proximate cause of death, however, as contributory negligence abounds I think

> it is in the best interest of the people of Alaska to expose this negligence and demand reform ... I believe an attorney should have been appointed for Mr. Selberg without delay. Only in this manner could the rights of Mr. Selberg have been protected on this law of this state—as the law of this state requires. *Even though it is doubtful that any physician on earth could have prevented Mr. Selberg's death I feel that the medical attention received was minimal. I find it hard to believe that a 20th century physician would tolerate the filth exhibited in the photos* Investigator Barnard processed of the corpse. *Neither can I understand why that physician would allow a period of over a week to pass without his patient receiving psychiatric treatment when his order for treatment was amplified with, "ASAP."* The command structure of the correctional center is unbelievable. Not one individual took the initiative to seek phychiatric help for an individual so obviously in need. [Emphasis added].

The Daily News editor could also have relied on the views of Commissioner Williamson, Dr. Green's ultimate superior at the time of Selberg's death. In interviews with the Daily News on March 10 and 11, 1976, nearly two weeks before the March 24 editorial, Commissioner Williamson stated:

> [W]e are all guilty.
>
> The fact is the man died and should not have died. I think we can stop it from happening again.
>
> It looks like a total foul-up. There was a major breakdown in just about every element of the system. If anyone along the way had made another decision, Selberg would still be alive.

Williamson strongly implied that Dr. Green's efforts to get Selberg transferred from the jail were inadequate:

> Williams said Tuesday that persons suspected of being mentally ill frequently wind up in jail on minor

> charges. The procedure for getting them treatment—through medical examination, *a written opinion from the doctor informing the court* and then an eventual court order—was ordinarily "adequate and timely." In this case, however, he said, *"It was not made plain to anyone that this guy was really very sick."*
>
> Both the arresting officers and the judge involved in the case have attested to the difficulty in getting a mentally disturbed and possibly violent person such as Selberg admitted to the Alaska Psychiatric Institute (API). Williamson, however, believed that these statements arose from misinformation rather than fact. "There was nothing to stop anyone—the law enforcement people or corrections or the *medical staff*—from making an on-the-spot decision, picking up the phone and calling API. I have trouble with all of it," he continued. *"Especially the medical end."* [Emphasis added].

Second, the editorial does make it clear that Selberg was found by the coroner's jury to have died of natural causes. Further, the editorial followed a series of Daily News articles concerning Selberg's death. These articles reported: Selberg died of "collapsed lungs" due to natural causes (February 28, 1976); "[t]he autopsy report says the 'death appears to be on the basis of natural causes' " (March 1, 1976); "Selberg died of collapsed lungs after nine days of irrational behavior" (March 2, 1976); "[t]he coroner's inquest ruled 'death from natural causes'; both lungs had collapsed" (March 3, 1976); "a coroner's jury ruled that death was from 'natural causes' " (March 12, 1976). And, importantly, Dr. Green's position on this matter was fully reported:

> January 5, the day before Selberg died, the doctor observed him through the plexiglass window of his cell, lying on the floor and "breathing in normal fashion."
>
> "I ascertained that he was scheduled to see a psychiatrist and we all breathed a sigh of relief."

> By that time, according to other testimony from guards and the autopsy report, the man had lost a great deal of weight and was severely dehydrated.
>
> However, Green explained, he saw no need to go in and examine Selberg again. "As it turned out, it's a natural death. I doubt if it would have made any difference," he said, "this is the way I've rationalized it to myself."
>
> Pointing out that he is not a "chest man," Green went on to speculate that Selberg may have had weak spots on the surface of his lungs—"a freakish lesion" —that could have developed spontaneous leaks by his falling or stumbling and hitting the bunk.
>
> "As with all my patients, I had appropriate concern for the man," Green concluded. "I felt that I had done the right thing. Given all the facts, I believe I'd do the same thing again." [March 9, 1976].

Thus, the position now taken by Dr. Green that Selberg died of natural causes having nothing to do with his confinement was often set forth by the Daily News. It is true that the editorial which reported Dr. Green's dismissal did not contain an affirmative expression of opinion by the editor that Selberg's death was not related in any way to his confinement. Such an expression of opinion would probably have been the only effective way to negate the implication of responsibility which would naturally be drawn from the fact of Dr. Green's dismissal. However, the editor did not have a duty to believe that Selberg's death was not related to his confinement, nor was he required to say that he held such a belief. It is not heresy to lack faith in an opinion expressed in a medical report.[2] In fact, even Dr. Green in his statement reported on May 9, set forth above, speculated that Selberg's death could have been caused by a blow caused by Selberg's "falling or stumbling and hitting the bunk"—a comment which indicates doubt concerning the

[2] Dr. Beirne's view as to the spontaneity of Selberg's death is, of course, an opinion.

conclusion of the autopsy and suggests that leaving Selberg in an unpadded jail cell without restraints played a causative role in his death.

Third, the Daily News series concerning Selberg's death was in keeping with those values designed to be secured under the constitutional guarantees of freedom of speech and of the press. It received commendations from the American Bar Association and the American Trial Lawyers Association. It exposed dramatic shortcomings in the manner the state cared for those who pose a danger to themselves through delirium or insanity. The record does not reflect whether lasting improvements in the care of such persons were made as a result of the series, but obviously pressures for reform were generated by it.

Today's decision may cause Alaska newspapers to repress information and opinions on matters of public concern because of the fear of a libel suit. On a national level, the Supreme Court of the United States in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L.Ed. 2d 686 (1964) was concerned about this risk,[3] and formulated a rule designed to guard against it. As applied by the majority in the present case, however, the protection afforded by the *Times* rule is so weak as to be illusory.

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[3]

> [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."

New York Times Co. v. Sullivan, 376 U.S. at 279, 11 L.Ed.2d at 706.

IN THE

Supreme Court of the State of Alaska

THOMAS GREEN, M.D.,
Appellant,

vs.

NORTHERN PUBLISHING COMPANY, INC.,
d/b/a ANCHORAGE DAILY NEWS, a business corporation,
Appellee.

Superior Court
No. 76-2488 Civil

Supreme Court
No. 5448

ORDER

Before: Burke, Chief Justice, Rabinowitz, Matthews and Compton, Justices. [Connor, Justice, not participating.]

On consideration of the petition for rehearing filed November 22, 1982,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on February 1, 1983.

CLERK OF THE SUPREME COURT

ROBERT D. BACON

Robert D. Bacon

[Matthews, Justice, dissents. He would grant the petition.]

ccs: Justices
Counsel
The Honorable S. J. Buckalew
Clerk of the Trial Courts, Anchorage

ANCHORAGE DAILY NEWS

March 24, 1976

Our views:

Selberg action

Finally, the state has recognized its responsibility for the death of David Paul Selberg.

The 23-year-old pipeline worker died in an Anchorage jail Jan. 7. In February a coroner's jury ruled that death was from natural causes. Then everyone involved chose to drop the sordid matter—to forget that a very sick man who had committed no crime had been locked in an 8½ by 7½ foot concrete cell for nine days and left to die.

Earlier this month, The Daily News published an exclusive series on Selberg's death after an extensive investigation. Soon after, the state Department of Health and Social Services (HSS) began to look into the case, and Atty. Gen. Avrum Gross stated that although the Anchorage District Attorney's Office felt they could not prove criminal negligence, his office would act in an advisory capacity to HSS.

Since then, HSS Commissioner Frank Williamson has taken steps to assure that such a tragedy does not happen again.

First, he abruptly cancelled the $125,000 a year contract of Dr. Thomas F. Green, the physician serving Anchorage jails for the past six years.

Second, he held a meeting last week in Juneau with heads of the divisions of Corrections, Mental Health and Public Safety and members of the state court system.

Third, as a result of that meeting, he has appointed a committee to meet here April 16 for a day-long conference. This group is comprised of "principal figures in the criminal justice system and the private medical community" in Anchorage. Its purpose will be to establish definitive procedures for handling disturbed citizens such as Selberg, and to delineate clearly the responsibilities of the city police, the state troopers, the courts, the jails and our mental health facilities toward persons in their charge.

Mr. Williamson's candor in the case is in welcome contrast to others more directly connected with the Selberg death. The actions he has taken so far have been constructive, if overdue.

We hope that the April 16 meeting here will reflect the same spirit. We need positive results from those participating, for they are the ones who serve our community and must assure our safety.

ANCHORAGE DAILY NEWS

February 28, 1976

Death in a jail— how did it happen?

By NANCY DOHERTY
Daily News Staff Writer
(First of a series)

A 23-year-old pipeline worker was found dead Jan. 7 in an isolation cell at the Anchorage state jail annex.

The man had been taken into custody early Dec. 29 by police officers responding to a call from friends distressed by his deranged behavior. He was arrested for disorderly conduct, with the policeman's recommendation that the charge be dropped and the subject given immediate psychiatric care.

Nine days later, never arraigned, never assigned a lawyer, never treated for his mental problems, the man died of collapsed lungs. The coroner's jury at an inquest Feb. 6 ruled the death was from "natural causes." On Feb. 11, Presiding Superior Court Judge Ralph Moody sent a grand jury evidence from the inquest, along with jurors' comments and letters from the Coroner Dolores Wilks and the Alaska Mental Health Association.

As of this writing, no further action has been taken.

The Daily News, after conducting an extensive investigation, found important questions in the case remain unanswered. Questions about a system that allowed a troubled young man, innocent of any crime, to die alone in jail.

We intend to ask those questions.

SEVEN COLOR photographs taken by state troopers record the end of David Paul Selberg. A filth-smeared concrete cell, a metal slab of a bunk, a steel toilet, a naked body stretched full-length on the floor. The worst part is the eyes. Nobody closed the eyes. They are big and clear and blue. They say: this was a person.

You can't look at the eyes and not ask: Who was this man? How did he wind up here?

DAVE SELBERG GREW UP in comfortable, middle-class Concord, Calif., the youngest in a family of five. After

high school he took off for Lake Tahoe, where he skied and worked as a cook in local restaurants. At 19 he met and married Susie Dudley, who was 15.

In January 1975 he and Susie and their year-old son moved to Alaska. Dave bought a house in Anchorage and went to work as a cook in pipeline camps. He kept his family nearby, in trailers or small cabins. In late November his wife left him and moved back to her home in Nevada. Dave was fired from the Valdez Terminal camp Dec. 19, for alleged drug use and he returned to Anchorage.

Nineteen days later a state trooper was photographing his corpse on a jail cell floor.

"WE WERE EXPECTING him to show up any minute when we got the news he was dead," his father, who lives in Concord, said in a recent telephone interview. "We sure loved that boy."

Charles Selberg and his son had not seen each other since August 1974, but they spoke by phone at least once a week. "Now his mother and I sit in the kitchen and just can't believe we're not going to hear his voice again Dave was a real talker, you could hear him all over."

According to his father, Dave had a normal childhood, complete with Little League, Boy Scouts, bowling trophies and ski club. "He was real outgoing. The guy sure loved living. He loved Alaska too. He'd call up and say, 'Dad, you just gotta come up here'."

SELBERG DID NOT think his son had any serious problems. He expected that Dave and Susie would get together again when he came home to visit.

The last time Dave called his father was late at night, Dec. 26 or 27. "He sounded real good. He said he was coming home."

Friends and relatives in Anchorage knew Dave as a hard-working, hard-drinking guy who loved to ski and cook and party and get high. He was a guy with great hopes for the future.

AT THE INQUEST, two co-workers at pipeline camps testified that Selberg seemed "spaced out" on drugs while there. Those who knew him well here reject the notion that he had a drug problem.

"The only thing Dave was addicted to was money." said his sister-in-law Marilyn Garner during a recent interview. "He worked hard—constantly—to get things for Susie."

Mrs. Garner and her husband Ray, who saw the Selbergs often during the past year, said Dave's big ambition was to make enough money buying and selling real estate to retire by the age of 30. He had great self-confidence, tended to monopolize conversations, and knew how to talk people into doing what he wanted. But gently. "He couldn't spank his own son," said Mrs. Garner.

DAVE STAYED with the Garners when he got to Anchorage in December. "He kept saying he was really happy, that he's never had so much fun in his life," Mrs. Garner recalled. "I think deep down he was upset about Susie leaving. He was taking out a bunch of girls but all he talked about was her."

"Listen, he made a lot of people happy," said Ray Garner. "He was a good dude."

JOE AND MARK Champion and their friends had known Dave since last June. To them he was just one of the guys, "a real mild person."

"HE SEEMED TO have it all together," Joe, an 18-year-old bull cook, recalled not long ago. "He had his whole life planned. I wish I had my life planned like that. He was always talking about Tahoe, how he would get a house there, build a ski lodge where he would bake little pastries and serve continental breakfast."

In late September, Joe and Dave went on R&R together. Dave seemed worried about his wife then, but otherwise fine. "We just partied and went to bars. He got wasted like everyone else, but he was always in control. In fact he was quieter than a lot of us."

THE CHAMPION brothers and their friends insist they never saw him take anything stronger than marijuana. Until Dec. 26.

That was Dave Selberg's last weekend before jail,

ON FRIDAY, DEC. 26, Hank Parker, a friend who rented Dave's house, picked him up at the Garners. They had a few drinks and smoked a few joints at his house, according to Parker. Then Dave left.

Later that night Joe and Mark Champion saw Dave at Chilkoot Charlie's. "He was so different, it was like I didn't know him," Joe recalled. He saw Dave take a "hit of blotter" (LSD). When he became rowdy and offensive and slapped Joe in the face, the brothers went home.

"I felt like I didn't want to see him again," said Joe.

ON SATURDAY, DEC. 27, Dave called the Garners in the early morning and talked aimlessly, annoying them. "A couple of times in the middle of something he'd ask 'so what's the answer?' " his sister-in-law recalled. "So I would say, 'what's the question?' " Finally, she says she hung up.

That afternoon Dave came to their apartment while friends were visiting. He was loud and disruptive. He barged into the apartment next door, where he took off his shirt and shoes. The Garners were so furious they wanted to punch him. Then at Dave's insistence, Ray Garner dropped him at the Anchorage Westward Hotel. "I just thought he was blowed away."

But thinking back on that evening, they both agreed: "That wasn't Dave at all."

Selberg was picked up later that night at the hotel for trespassing. The arresting officer said he appeared incoherent and affected by drugs. At one point he identified himself as "Susie." He was booked as John Doe.

ON SUNDAY, DEC. 28, Dave called the Garners from jail. They scooped up all his gear and his ticket to San Francisco, bailed him out and drove him straight to the airport. "At that point we just wanted him out of our house and out of our life," said Marilyn.

As they left, Dave told them: "The next time you see me is the day you apologize."

Hank Parker later joined Dave at the airport for drinks, then left again. Dave acted a little strange, Parker said at the inquest, "but nothing specific, so you would say, 'oh, god, this guy's crazy'."

ABOUT 10 P.M. Dave called Joe Champion from the Gold Rush bar. He apologized for his behavior Friday night. Champion picked him up, brought him home, shared some pot with him.

"He seemed in control at first. Then he started getting weird, dancing around, taking off his clothes, talking a bunch of nonsense. I never saw anyone act like that before."

" 'You'll know the answer, you'll know the answer,' he said to me once. It was like his unconscious was trying to tell me something."

AS DAVE GOT louder and more active and could not be subdued, Joe decided he needed help. According to the two Champion brothers, their older brother David called the Alaska Psychiatric Institute and was told they would call him back. The woman who returned the call advised them to telephone the police.

"When the cops got here, they freaked out. They didn't want to take him," said Joe.

But Dave left without protest. His friends watched as, laughing, he stuck out his legs and the two officers slid him along the front walk to the patrol car, bent his body to get him inside, and drove off.

That was the last time anyone who knew or cared about Dave Selberg saw him alive.

ANCHORAGE DAILY NEWS

March 1, 1976

Young man's last 9 days in Jail

By NANCY DOHERTY
Daily News Staff Writer
(Second of a series)

March 1, 1976

Why did a 23-year-old pipeline worker die last January after nine days in an Anchorage jail?

The autopsy report says the "death appears to be on the basis of natural causes."

What went wrong with David Paul Selberg, however, during the weekend after Christmas 1975 and led to his death, we cannot know. Was he upset over his marriage problems? Did his disorder stem from the LSD he reportedly had taken?

WE DON'T know.

What we do know is that his behavior became increasingly irrational and incoherent. By late Sunday night, Dec. 28, his friends had decided to find help for Selberg. After failing to get immediate aid from Alaska Psychiatric Institute, they called the police.

Selberg was taken to jail. Nine days later he died there.

This is the story of those last nine days, from his arrest to the discovery of his body. It is a grim story. One that raises serious questions about how well Alaska's courts, corrections and mental health institutions, serve its citizens.

•

ON DEC. 29, ABOUT 2 A.M. David Paul Selberg was brought to the state jail annex at Sixth Avenue and C Street by two policemen and booked for disorderly conduct. Arresting officer Tom Stanley recommended that the charge be dropped and the man given immediate psychiatric treatment.

UNDER "remarks" on the arrest form someone wrote "very unstable . . . broke past guard and ran down hall."

Selberg was locked in one of the jail's three detoxification cells, without clothes or bedding.

At 1:30 that afternoon Selberg was taken from jail by Judicial Services personnel for arraignment in court. When his name was called, however, Judge Laurel Peterson was told he was not in condition to be arraigned. Peterson continued the arraignment to the next day and ordered a physical examination within 24 hours.

JUDICIAL Services, a division of the state troopers responsible for transporting prisoners, refuses to comment on Selberg's failure to appear.

At 2:30 p.m., Selberg was returned to jail. At 8 p.m., Dr. Thomas F. Green entered the cell with two guards. Green, who has had an exclusive medical contract with Anchorage state jails for the past six years, testified that he "found the patient hallucinating wildly; physically agitated to the point where he was prancing in the small confines of the place where he was kept."

Though he had difficulty examining Selberg, Green determined that "he had all basic systems operating," and detected no abnormalities of heart or lungs.

DR. GREEN, aware that the patient had been in this state of hyperactivity for at least 10 to 12 hours, administered no sedatives. He left Selberg as he was and made a written recommendation that he see a psychiatrist "as soon as possible."

On Dec. 30, Judge Peterson signed a form from the jail which noted Green's opinion and requested that arraignment be continued indefinitely. He said at the inquest that he then received a call from Tom Roberts of Judicial Services elaborating on Selberg's condition (Roberts has declined comment on this.) After this conversation, Peterson issued a court order for a psychiatric exam. A clerk then "set up the earliest possible date for the examination"—Jan. 7. "I was rather surprised it was as soon as it was, to be very honest with you," Judge Peterson testified.

On Dec. 31, a court clerk sent notice of the appointment to Corrections. That was the last attention paid the man by Alaska's state court system.

WHAT HAPPENED during those nine days in prison?

We will never know how it was for David Paul Selberg. He could not communicate his needs or feelings then. Some guards and two inmates interviewed thought he had moments of coherence. Corrections officer Marvin Matthews said, at the inquest he understood Selberg had been capable of speaking to others when first in jail, and that he had "better and worse days." But it seems clear that he had retreated to a world of his own.

FOR A BRIEF period—less than three days at most—he was kept in a maximum security "suicide prevention" cell with a wire mesh door. But most of that last week Selberg was locked in a detox cell, and it was in a detox cell that he died.

The room, also known as a "drunk tank," measured 7½ by 8½ feet, and had concrete block walls and a steel door with a plexiglass window looking into the hall. It contained a metal slab—a cot—a steel toilet stool, and small one-wall vent.

Jail superintendent Charles Moses and other personnel there say the cells are warm. Some guards testified they did not know the temperature, or whether the vent let in hot air or cold. Some inmates say it is cold back there. Whatever the case, Selberg remained naked and rejected any clothing proffered. He never had a mattress or blanket.

HE HAD no source of comfort or help. No family, no friend, no lawyer or psychiatrist ever visited. He did not ask to see anyone of these people, jail officials say. But then, he was not capable of asking for anything.

It was the guards who saw Selberg most often. They could not avoid knowing his condition. Three times a day they placed meals inside the cell. They were keenly aware of the food and waste on walls and floor. They heard his rambling and ranting. They watched him throw himself against the door, the bunk, the wall.

They testified to self-inflicted bruises they saw, the weight loss they could detect day by day.

They made few notes in the Observation Cumulative Report, a record kept on all single cell inmates. "Inmate screaming, tore clothing . . . screaming, kicking . . . lying on floor . . . roaming about . . . lying on floor." "Lying on floor" was the last entry.

TWICE they were ordered to give him showers. Jan. 2, four guards had a garden hose hooked up to a shower head containing a mix of hot and cold water. They sprayed this on Selberg in a shower stall. Jan. 5 two guards gave him another shower, this time attaching the hose to a sink with separate spigots. They rinsed him for 10 minutes or so, alternating the hot and cold. Selberg showed no reaction to the abrupt temperature change, they later testified.

Besides the guards, two medical assistants working for Dr. Green regularly saw Dave Selberg. Who and how often is not clear. One, a registered nurse named Steven LeFevre, has said he saw Selberg five times. Dr. Green testified that an assistant "trained in detecting patients in distress" observed him "at least twice a day during the period." In any case, the assistant or assistants did not go in, but merely looked through the window, which, according to other testimony, was battered and often smeared with food. Whatever they saw apparently did not spur them to take action.

ON JAN. 5, THE DAY before Selberg's death, Dr. Green "took a look" into the cell on his weekly rounds, and saw him "resting or sleeping on the floor." He did not go in for a closer look. He was surprised to find Selberg still there, he told the coroner's jury, and asked someone if an appointment had in fact been made.

EARLY IN THE EVENING Jan. 6 Sgt. Parks saw Selberg awake and leaning against a wall. At 11:40 p.m., while taking a head count, he saw him again, this time lying on the floor, apparently asleep.

Just after midnight, Officer Matthews also observed motionless on the floor, his hands up on his chest. He found it "startling", knowing Selberg's behavior pattern, that he was not moving around as usual. Because the window was small and

dirty, Matthews could not make out his features to see if he was breathing. So he went in. Selberg was dead.

Eight hours after the body was discovered, Dr. Michael F. Beirne performed an autopsy. According to his report, dated Jan. 25, he found the lungs collapsed, the body severely dehydrated, no significant bruises or other trauma. His conclusion: "The cause of death appears to be on the basis of natural disease. This man had a spontaneous pneumothorax (leaking of air from the lung through damaged tissue), which is relatively common in young males of his age. Usually it involves one lung only and usually it is not a real serious problem for the individual. However, in this case, it involved both lungs and caused his death."

Feb. 6, the coroner held an inquest. Twenty-one persons testified. The jury, limited to three findings—homicide, suicide or natural cause—failed to establish criminal negligence in the face of Dr. Beirne's testimony that Selberg died from a natural, although very unusual, illness. They ruled "death by natural causes."

THREE OF the six jurors, troubled by what they had learned in the 10 hours of testimony, submitted comments criticizing the treatment of Selberg. Coroner Delores Wilks told the jury that while she could not order a probe, she hoped there would be a grand jury investigation into the matter.

A week later a file of evidence from the inquest was sent to the grand jury sitting at the time, along with the jurors' comments, and letters from Mrs. Wilks and the Alaska Mental Health Association.

Dave Selberg's family has also indicated its intention to sue the State of Alaska for wrongful death.

HOW DID THIS 23-year-old mentally disturbed man get trapped in Alaska's criminal justice system? Why did the individuals in this system fail to respond to his obvious and desperate need? Did the terrible condition in which he spent his last nine days of life help bring about his death?

ANCHORAGE DAILY NEWS

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System at fault in jail death?

By NANCY DOHERTY
Daily News Staff Writer
(Last of three articles)

What is wrong with a system that lets an innocent young man die in jail?

That is one question among many stemming from the Jan. 6 death in state jail of David Paul Selberg. But no authority has yet tried to answer it or others surrounding the case, officially ruled as a natural death. Selberg died of collapsed lungs after nine days of irrational behavior.

SELBERG, a 23-year-old pipeline worker who apparently had taken LSD, became irrational and incoherent last Dec. 28. His friends decided to seek help, and called the police.

That was the first in a series of events and inaction that led to Selberg's death in Jail—a young man who had committed no crime.

An extensive Daily News investigation has brought these critical points concerning the Selberg case to light:

• Selberg should never have been arrested in the first place.

Had he been taken to a hospital emergency room, an entirely different set of events may have been triggered. According to the emergency room supervisor at Providence Hospital, had Selberg been brought to the hospital, he would have been examined and then admitted or transferred to the Alaska Psychiatric Institute (API).

But that apparently didn't occur to Selberg's friends. Instead, they say they called API directly and were advised to call the police.

The acting supervisor of API, however, says that as far as she can tell, no one ever contacted the state mental institution about Selberg. A record is kept of all calls for help, Mrs. Roxy Pomeroy states. There is no such entry for that night, nor does anyone on duty at the time remember the call.

WHY DIDN'T the city police bring Selberg to API? Why didn't the court or the jail have him transferred there?

According to Mrs. Pomeroy, API has had a complete, although temporary, security unit since Oct. 1, 1975. On the night of Selberg's arrest, several beds in it were empty. If the police had brought some-one in, they would only have had to wait for the doctor on call to arrive in order to leave him. If API had received a physician's certificate from the jail physician, Dr. Thomas F. Green, they could have taken him. If they had received a court order they could have taken him. None of these occurred.

"There's no way that you can just take him in there," said arresting officer Tom Stanley. The procedure for emergency commitment, as he understood it, was to take the subject first to a doctor (usually at a hospital), have him examine the patient and sign a certificate, and then turn the man over to API. Because this is a time-consuming process and Selberg seemed potentially violent, Stanley and Sgt. Richard Allen took him to jail instead. They saw this as a safety measure, expecting that he would calm down by morning. If not, they figured, either Dr. Green or the judge at the arraignment would commit him immediately to API.

SGT. GENE Pennington, community relations officer for the Anchorage Police Department, concurs. "API won't take anyone in the middle of the night. Our patrolmen won't even bother notifying them any longer. I seriously doubt if any one of them has ever gotten someone into API after hours."

Judge Laurel Peterson testified at the inquest that it is "very difficult" to place anyone at API, even with a court order. He had heard they were getting a security wing, "but whether that is in effect now, I'm not at all certain."

In a recent interview Charles G. Moses, superintendent of the state jail annex at Sixth Avenue and C Street, said that "our files are well documented with attempts to get appropriate placement for cases like Selberg." He also said that he did try on one occasion to have Selberg transferred to an "appropriate place" for treatment. He said he didn't know API had a

security wing in use. He also said he was unaware that an inmate could be transferred to API by the jail physician, Dr. Green.

DID API in fact have facilities easily available for treating Selberg? If so, why were the city police and corrections and court personnel apparently unaware of this fact, or of the procedures for using these facilities?

The questions begin to multiply.

Once Selberg was caught up in the criminal justice system, it must have been clear to everyone—from the arresting officers and jail people, to Judicial Services personnel and the judge—that this man, because of his irrationality, could not handle his own affairs. Yet no one tried to get him outside help.

• Selberg was never appointed a lawyer.

Judge Peterson on Dec. 30 granted a Corrections request for an indefinite continuance of Selberg's arraignment, thus in effect leaving his legal fate in the hands of the jail. Yet he took no step to safeguard the man's rights. Asked at the inquest if an attorney was ever appointed for Selberg, he replied, "I don't know."

Whose responsibility was it? The district attorney's office and local lawyers consulted call this a "gray area" but agree that Judge Peterson was certainly in the best position to take such an action. (Peterson is currently on vacation and unavailable for comment.)

• Selberg never saw a psychiatrist.

Peterson did sign a court order for Selberg's examination at Langdon Clinic, based on the jail doctor's recommendation that he be seen "as soon as possible," and a description of his condition by Tom Roberts of Judicial Services. A court clerk arranged the appointment by telephone for eight days later, the normal length of time, according to Langdon Clinic secretary Shirley Henderson. She testified that if anyone—a judge, a lawyer or someone from the jail—had called to say this was an emergency, an appointment could have been made "probably the same day."

Yet Peterson stated at the inquest that he did not recall being advised to order the exam immediately, and in any case he considered a week "an inordinately short time."

PRISON Superintendent Moses, when asked why no one on his staff called Langdon Clinic, repeated that he did once "attempt to take action." But, he added, "This institution is not part of arrangements for psychiatric exams. That is not one of our functions."

In fact, Anchorage state jails did have an on call psychiatrist under contract until July 1, 1975. According to Moses and state Director of Corrections William Huston, however, no funds were available for a psychiatrist this fiscal year. They do not know why the state could no longer afford to provide this service.

Dr. Green, the jail physician, was the only doctor who saw Selberg during his last nine days. It was on Jan. 5 that Green said he saw with "surprise" that Selberg was still there. He later told the coroner's jury that the man "had no place or no reason to be maintained at a holding facility."

Yet there is no record of any medical attendant at the jail seeking additional expert attention for Selberg. Why?

(Dr. Green has been in Africa for the past several weeks and unavailable for comment.)

Why didn't anyone who saw Selberg's daily deterioration do something? Moses claims that "concerned guards" spoke to him about Selberg and that he, in turn, "did talk to the medical staff regarding him." Whatever the content of these conversations, the outcome was to leave him as he was, sick, naked and alone in his tiny concrete cell.

- Selberg's relatives never knew he was in prison.

Although Selberg's wife and child had moved Outside, some of his in-laws live in Anchorage. Corrections had a record of at least one such family member since she had posted bail for her brother-in-law Dec. 28.

His mother's name and address also were listed under "next of kin" in his file. Why did it not occur to the

administration to notify these people that Dave Selberg was in jail and unable to conduct his own affairs? "I didn't think in terms of contacting the family," said Moses, "because this is not a routine procedure in matters such as these." The jail, he explained, is accustomed to calling relatives and friends only when requested by inmates.

• Selberg's friend who tried to visit him was never told of his condition.

Joe Champion, a friend who had originally called the police, could not locate Dave's relatives. He went to the arraignment, where he was simply told Selberg would not appear. He came to the jail to visit, but was turned away because he did not have proof of age. (Although identification is required, visitors there say the rule is not usually enforced.) Champion, assuming his friend was being treated, gave up.

Why didn't jail personnel tell him of Selberg's plight, so he could get help?

DR. MICHAEL BIERNE, who performed the autopsy, claimed in his report and at the inquest that Selberg's double lung collapse was the result of natural disease.

Other local pathologists have declined to comment on Bierne's conclusion, because of the "current political climate in Anchorage."

IN A PHONE conversation last week, Bierne noted that he must be "very careful" of his statements because of pending litigation, possibly by Selberg's family. He went on to reassert his position: "I have no reason to believe that what happened to him (Selberg) wouldn't have happened at any time in his life."

If a suit against the state is filed, one focal point will certainly be the autopsy report. Laymen hesitate to contradict experts, but most people familiar with the case find it hard to believe that those last nine days of Dave Selberg's life did not contribute to his death.

We may never know. But we do know that Dave Selberg should not have suffered through those nine days in jail.

How did it happen? How could it have been prevented?

Obviously, Anchorage needs a place where mentally disturbed people can be taken for treatment, night or day, by police officials or ordinary citizens, without orders or petitions or certificates. A place where a patient could be examined immediately by someone qualified to determine the seriousness of his condition.

But the most shocking part of the case is the fact that for nine days in state jail, Selberg was a human in distress and didn't receive help.

"How could they keep walking by his cell and just say, 'Oh there's that crazy guy'?" Selberg's brother-in-law asked bitterly last month. "How could they keep doing that?"

Before Selberg's death can be forgotten, this question must be answered.